UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

PUEBLO OF SANTA ANA, and TAMAYA ENTERPRISES, INC.,

Plaintiffs,

No. 1:11-CV-00957BB-LFG

v.

HONORABLE NAN G. NASH, District Judge, New Mexico Second Judicial District, Division XVII, in her Individual and Official Capacities; GINA MENDOZA, as Personal Representative Under the Wrongful Death Act of Michael Mendoza, Deceased; F. MICHAEL HART, as Personal Representative Under the Wrongful Death Act of Desiree Mendoza, Deceased; and DOMINIC MONTOYA,

Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS MENDOZA AND HART'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

On May 24, 2012, Plaintiffs filed a Motion for Summary Judgment on their claims herein, Doc. 52. Defendants Gina Mendoza and F. Michael Hart ("the Mendoza Defendants") filed their Response to that motion on June 28, 2012, Doc. 65.[1] By this Reply, Plaintiffs will demonstrate that the Mendoza Defendants' Response, to the extent that it takes issue with Plaintiffs' arguments, proceeds on the basis of thoroughgoing confusion of the distinct issues of subject

[1]Defendant Hon. Nan Nash filed her Response, through the New Mexico Attorney General, on June 8, 2012, Doc. 58. Plaintiffs replied to that Response on June 26, 2012, Docs. 63, 64. On July 2, 2012, Defendant Dominic Montoya filed a Notice of Joinder in the Responses of both Defendant Nash and the Mendoza Defendants to Plaintiffs' Motion for Summary Judgment, Doc. 66.

matter jurisdiction based on *Williams v. Lee*, 358 U.S. 217 (1959), and tribal sovereign immunity, and that on the issue actually presented in Plaintiffs' motion, the Mendoza Defendants appear to be in full agreement with Plaintiffs.

The Mendoza Defendants begin their Response by accurately stating that Plaintiffs' motion presents the question whether there is "express congressional authority which would allow the New Mexico state district court to exercise subject matter jurisdiction over the pending state court wrongful death case brought by Mendoza against TEI." Mendozas' Response, etc. (hereinafter, "Mendoza Resp.") at 1.[2] To this inquiry, the Mendoza Defendants answer, "*Of course, there is none*." *Id*. (emphasis added).

That answer should have ended the Mendoza Defendants' Response, as it amounts to a complete and unqualified concession that Plaintiffs' arguments in their Motion for Summary Judgment are correct and well-taken. That is, if there is no explicit congressional authority under which a state and a tribe could agree to state court jurisdiction over patrons' tort suits against tribal gaming enterprises, then the exclusive tribal court jurisdiction rule of *Williams* must control, and such suits may only be brought in tribal courts.[3]

But the Mendoza Defendants seem not to appreciate that fact, and they proceed with a lengthy argument that is almost completely based on a failure to distinguish the *Williams* subject

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[2]To be a bit more precise, the real question is whether there is congressional authority in the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 - 2721 ("IGRA"), that would permit a state and a tribe to effectively agree in a tribal-state class III gaming compact to shift jurisdiction over such cases from tribal to state courts.

[3]Under the tribal-state compact relative to this case, of course, binding arbitration is a further option available to an aggrieved patron. *See* Compact, Doc. 51.1, Ex. A to Stipulation, Doc. 51, at Section 8(E), (F).

matter jurisdiction issue from the totally distinct (and here, largely irrelevant) issue of tribal sovereign immunity. This can be seen clearly in the three sentences that follow immediately after the sentence quoted above, in which the Mendoza Defendants state:

> The fallacy of the Plaintiffs' analysis is that this absence of express authority (often referred to as "abrogation"[4]) is not the controlling question. Since state court jurisdiction, turns on the Compact's requirement that a state or federal court finally determines whether IGRA prohibits the Pueblo from waiving sovereign immunity, the inquiry is whether there is any language in IGRA, not giving authority to, but prohibiting the Pueblo from, waiving its immunity and agreeing to the subject matter jurisdiction of the state district court. Since there is not, the Pueblo's motion must fail.

Mendoza Resp. at 1. On the following page, this confounding passage appears:

> The Compact clearly articulates the issue in the "unless" clause in Section 8A: New Mexico district courts have subject matter jurisdiction unless "IGRA does not permit the shifting of jurisdiction over visitors personal injury suits to state court".
>
> Despite the Pueblo's attempt to turn the inquiry on its head, the precise question the court is being asked to decide is whether there is any expression, anywhere in IGRA, where congress expressly, or even implicitly, prohibited the tribes from waiving sovereign immunity.

Id. at 2 (emphasis in the original). These passages set the stage for virtually the entirety of the Mendoza Defendants' argument.

Two key points must be made in response: First, this case is *not* about whether or not a tribe may waive its sovereign immunity from suit. There is absolutely no doubt whatsoever that tribes have the power to make such waivers, on their own, and to confer such power on their subsidiaries that share in their sovereign immunity protection (such as TEI), wholly apart from the provisions of IGRA. Nor is there any doubt that Plaintiff Pueblo of Santa Ana (the "Pueblo")

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[4]In fact, the term "abrogation" in this context typically refers to a congressionally mandated waiver of tribal sovereign immunity. *See, e.g., Nanomantube v. Kickapoo Tribe*, 631 F.3d 1150, 1153 (10th Cir. 2011). That term is never used in any discussion of *Williams*-based subject matter jurisdiction.

made an effective (though limited) waiver of its immunity from suits brought by gaming enterprise patrons who claim to have suffered bodily injury or property damage caused by the negligence of the gaming enterprise, in the Compact, at Section 8(D). Plaintiffs raise no issue in this case as to whether that waiver is "permitted" by IGRA (much less "prohibited") or is effective. The Mendoza Defendants' lengthy and tortured arguments on this issue are thus entirely beside the point.

Second, although the Mendoza Defendants correctly identify the issue presented here, in the first sentence in each of the two passages quoted above, that is, whether or not IGRA "permits" jurisdiction-shifting with respect to patrons' suits, their contention that that equates to whether IGRA "prohibits" jurisdiction-shifting (actually, they say waivers of immunity, but we can disregard that) is completely wrong.[5] The rule that is clearly established by *Williams* and by *Kennerly v. District Court*, 400 U.S. 423 (1971), is that unless Congress has expressly *authorized* (*i.e.*, "permitted") state court jurisdiction (as it did in the Act of August 15, 1953, Pub.L. 83-280, 67 Stat. 589, codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. §§

[5]An especially peculiar example of this fallacy is found in the footnote on page 9 of the Response (although Plaintiffs are unable to determine which portion of the text the footnote annotates). The footnote reads, "Even if the court determines that IGRA does not expressly allow jurisdictional shifting, that is not the same thing as determining that it prohibits it." Plaintiffs are actually in full agreement with that statement, but not with what they perceive to be the Mendoza Defendants' implied meaning–that what this Court must find is a *prohibition* against jurisdiction-shifting (although again, the Mendoza Defendants typically, and completely erroneously, refer to a prohibition against "a waiver of immunity;" *see, e.g.*, heading number 2 on page 9). That is not what the Compact language calls for, but more importantly it is directly refuted by *Williams* and *Kennerly*. The holdings of those cases is that if there is no express congressional authorization for state court jurisdiction over cases against Indians within Indian country, tribal court jurisdiction in such cases is exclusive. There is thus no basis on which the Court needs to look through IGRA for a "prohibition" against jurisdiction-shifting, much less against waivers of immunity.

1360, 1360 (note) (commonly known as "Public Law 280")), civil actions arising within a tribe's Indian country that involve a tribe or tribal member or entity as defendant may only be heard in the tribal court of the tribe. It is established that New Mexico never assumed jurisdiction over such matters under Public Law 280. *Doe v. Santa Clara Pueblo*, 2005-NMCA-110, ¶ 8, 118 P.3d 203, 206, *aff'd*, 2007-NMSC-008, 154 P.3d 644. The only question that remains, therefore, is whether any provision of IGRA would permit such an assumption of jurisdiction by New Mexico's state courts. And that is a completely different inquiry than the one that the Mendoza Defendants seem to think it is, *i.e.*, whether IGRA "prohibits" such jurisdiction-shifting. Without express *permission* in IGRA, the default position that applies is the *Williams* rule prohibiting state courts from hearing such cases. As noted above, the Mendoza Defendants concede that there is no such express permission in IGRA; consequently, Plaintiffs' motion must be granted.

II. REPLY TO MENDOZA DEFENDANTS' RESPONSE TO STATEMENTS OF UNDISPUTED FACTS

The Mendoza Defendants do not take issue with any of the facts set forth in Plaintiffs' Statement of Undisputed Material Facts, *see* Mendoza Resp. at 2, but they include ten additional assertions of what they claim are "additional material facts which are also not in dispute." *Id*. Nearly all of these are unsupported by the record, are disputed by Plaintiffs, and are not material to this motion in any event. Moreover, each of these new assertions of "fact" is taken verbatim from the Mendoza Defendants' memorandum in support of their motion for summary judgment based on preclusion issues, Doc. 81, at pp. 2-4, specifically, items 3 through 6 and 9 through 14

of the claimed statements of undisputed fact in that memorandum. Plaintiffs have responded to each of these assertions in Plaintiffs' Response to the Mendoza Defendants' Motion for Summary Judgment, Doc. 68, at pp. 2-4, and to avoid repetition those responses are incorporated herein by this reference. In addition to those responses, Plaintiffs would only reiterate what they said above, that none of these assertions (apart from numbers 4, 5 and 6, which are largely repetitive of Plaintiffs' statements of undisputed fact) are at all material to the issues presented by this motion.

III. THE MENDOZA DEFENDANTS' TOTAL EMPHASIS ON SOVEREIGN IMMUNITY WAIVERS COMPLETELY VITIATES THEIR ARGUMENT.

Virtually the entire argument of the Mendoza Defendants is centered on the issue of tribal sovereign immunity, as if that concept were simply another way of characterizing lack of subject matter jurisdiction based on *Williams*. The extent of the Mendoza Defendants' error is in this regard is shown by the statement, at p. 4 of their Response, referring to the "firmly established . . . immunity doctrine, stated in Williams v. Lee, 358 U.S. 217, 220 (1959)." The decision in *Williams* has nothing whatever to do with "the immunity doctrine." Indeed, the word "immunity" nowhere appears in that opinion, or in the opinion in *Kennerly*. That tribal sovereign immunity could not have been an issue in either case is clear from the identification of the parties in each case: an issue of tribal immunity would only arise if a tribe or a tribal entity were a party. But both *Williams* and *Kennerly* were private suits by merchants against Indian individuals. No tribe or tribal entity was a party to either case.

It is true that federal courts have referred to tribal sovereign immunity as raising an issue

of subject matter jurisdiction. *See, e.g., Breakthrough Management Group, Inc., v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1196 (10th Cir.2010). But that does not make that concept interchangeable with the issue of lack of subject matter jurisdiction under *Williams*. Indeed, there are important distinctions between the two doctrines. Sovereign immunity, the immunity of a tribe (or other sovereign) from suit, applies in any court, regardless whether the court would otherwise have jurisdiction over the subject matter of the case, but a waiver of that immunity does not confer jurisdiction on any particular court to hear the case. *See, e.g.*, *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) ("Mere consent to be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit."); *Tohono O'odham Nation v. Schwartz*, 837 F. Supp. 1024, 1031) (D. Ariz. 1993) ("A housing authority's waiver of sovereign immunity cannot render it universally amenable to action in any forum that a plaintiff selects . . . Rather, *a waiver only renders a housing authority amenable to suit in a court of competent jurisdiction*.") (emphasis added; citations omitted). But, as these cases show, and as Plaintiffs have freely acknowledged (and as the Mendoza Defendants tirelessly assert) the defense of sovereign immunity is waivable.[6] Subject matter jurisdiction may never be waived. *See, e.g., Hurt v. Dow Chem. Co.*, 963 F.2d 1142, 1146 (8th Cir.1992) ("subject-matter jurisdiction is not a mere procedural irregularity capable of being waived"). That is the basis of the *Kennerly* rule, that even an explicit decision by a tribe to allow state courts to exercise jurisdiction over actions against tribal members arising within the tribe's Indian country cannot

[6]For that reason, among others, one would think that sovereign immunity would more properly be characterized as an issue of *personal*, not subject natter, jurisdiction.

be effective, if it was not carried out pursuant to an explicit grant of authority by Congress.

The Mendoza Defendants nonetheless spend several pages attacking *Kennerly*, but again, repeatedly claiming that it is about a waiver of sovereign immunity, rather than an effort to confer jurisdiction on state courts that would otherwise be exclusively in tribal courts under the *Williams* rule. The bulk of that discussion, thus, can be disregarded; but one of their claims deserves mention. The Mendoza Defendants state that "[a]lthough any assumption of jurisdiction pursuant to Pub.L. 280 must comply with that statute's procedural requirements, ..., Pub.L. 280's requirements simply have no bearing on jurisdiction lawfully assumed prior to its enactment." Mendoza Resp. at 7-8 (citation to *Kennerly* omitted). Though not placed in quotation marks by the Mendoza Defendants, that passage was taken verbatim from *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 ("*Wold I*"),151 n.11. But it does not have the meaning that the Mendoza Defendants seem to think. In that rather unusual case, the state courts had taken the position that the tribe could not sue a non-Indian company in *state* court, unless the tribe agreed to allow state courts to assume jurisdiction over all causes of action arising within the tribe's Indian country. *Id*. at 146. The "jurisdiction" that the Court was referring to in the quoted passage, however, was jurisdiction of the state courts to hear claims by Indian *plaintiffs*, not claims against Indian defendants, as here. Indeed, the Court made clear that North Dakota's contention that its courts could "exercise jurisdiction over claims by non-Indians against Indians or over claims between Indians, . . . intruded impermissibly on tribal self-governance" *Id*. at 148; *see also Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 ("*Wold II*"), 880 (1986).

Wold II[7] goes into considerable analysis of Public Law 280, noting that it "largely eliminated" the "pre-existing federal restrictions on state jurisdiction over Indian country." *Id*. at 879. The Court's discussion of the Act fully supports Plaintiffs' explanation of *Kennerly* as having established that without strict compliance with Public Law 280's requirements, by the tribe and the state (and absent some other specific authorization for state jurisdiction), a state *cannot* exercise jurisdiction over actions against Indians arising within Indian country. To drive that point home, the Court specifically ruled that Public Law 280 fully preempted the field of state jurisdiction within Indian country, thus allowing for no contrary or "incompatible" state action. *Id*. at 884-85. The Court moreover explains that when in 1968, Congress included, as part of the Indian Civil Rights Act, amendments to Public Law 280 that imposed a new requirement of a clear expression of tribal consent (in the form of a majority vote of adult tribal members voting, at a special election called for this purpose; *see* 25 U.S.C. § 1326) to any attempt by a state to assume jurisdiction in Indian country under the Act, "Congress was motivated by a desire to shield the Indians from unwanted extensions of jurisdiction over them." *Id*. at 887. Plaintiffs submit that a very similar motivation is manifest in the narrowly sculpted provisions of IGRA that allow a compact to shift to state courts jurisdiction over actions "necessary for the enforcement" of "the criminal and civil laws and regulations of the . . . State that are directly related to, and necessary for, the licensing and regulation of [class III gaming]."

In short, the passages that the Mendoza Defendants cite from *Wold I* and *Wold II* do not

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[7]In *Wold I*, the Court remanded the case to the North Dakota Supreme Court, thinking that that court's decision may have been based on a misunderstanding of Public Law 280. After that court simply reaffirmed its previous decision, the case went back to the Supreme Court, which reversed, holding that the North Dakota court's ruling was precluded by Public Law 280.

assist their argument, but those decisions provide extremely useful background for and analysis of Public Law 280, and the whole history of congressional regulation of state court jurisdiction within Indian country, showing conclusively that if there is no specific authorization in IGRA for state court jurisdiction over patrons' tort suits, and the state has not assumed jurisdiction under Public Law 280, there is no basis on which state court jurisdiction may be upheld.

IV. THE MENDOZA DEFENDANTS' CLAIM THAT IGRA "DOES NOT PROHIBIT" JURISDICTION-SHIFTING WITH REGARD TO TORT SUITS MISSTATES THE CORRECT INQUIRY, AND IN ANY EVENT IS UNAVAILING.

The Mendoza Defendants do make an effort to argue that IGRA does allow tribes and states to transfer to state courts jurisdiction over patrons' tort suits, though they spoil it by wording the heading of the argument, "Congress, in enacting IGRA, *did not prohibit a waiver of immunity* to allow state court jurisdiction over visitor's injury claims." Mendoza Resp. at 9 (emphasis added).[8] They begin by claiming, erroneously, that

> IGRA actually does allow the tribes and states to negotiate the allocation of jurisdiction, in specified areas, such as those "directly related to, and necessary for, the licensing and regulation of such [Class III gaming] activity", and with "any other subjects that are directly related to the operation of gaming activities".

Id. at 9. Were that statement true, the Court would probably have to deny Plaintiffs' motion for summary judgment. But it is not. It is of course correct that IGRA, at 25 U.S.C. § 2710(d)(3)(C)(i) and (ii),[9] expressly allows for "allocation of criminal and civil jurisdiction

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[8]The wrongheadedness of the claim that IGRA must "prohibit" jurisdiction-shifting has been addressed above, at pp. 4-5.

[9]The Mendoza Defendants mistakenly cite to "25 USC §2710(c)" when they quote these provisions. Mendoza Resp. at 10.

between the State and the Indian tribe" for enforcement of laws and regulations "that are directly related to, and necessary for, the licensing and regulation of [class III gaming]." But the "any other subjects" language cited by the Mendoza Defendants comes from § 2710(d)(3)(C)(vii), the last, "catch-all" category of topics that may be included in a compact. That clause contains no language referring to any "allocation" or "shifting" of jurisdiction. And especially in light of the unusually strong language in the committee report, quoted in Plaintiffs' Motion for Summary Judgment, Doc. 52, at 16, there is no basis on which the Court could infer that such an allocation of jurisdiction is permissible in connection with *any* of the compact topics listed in clauses (iii) through (vii) of § 2710(d)(3)(C).

The Mendoza Defendants cite *Muhammad v. Comanche Nation Casino*, 2010 WL 4365568 (W.D.Okla. 2010), in support of their contention that despite the absence of any express language permitting jurisdiction-shifting regarding tort suits, IGRA could be interpreted to allow such compact provisions anyway, but they fail to note that the only authority cited by that court for that view was the New Mexico Supreme Court's decision in *Doe*. *Id*. at p. 5 n. 7.[10] Finally, the Mendoza Defendants argue that there is an "obvious nexus" between gambling and drinking: "Drinking encourages gambling; gambling encourages drinking." Mendoza Resp. at 13. What they seem to have forgotten is that the Mendoza parties were not gambling at all. They were at a wedding reception, in an event center that is connected to, but separate from, TEI's casino. While wedding receptions may "encourage drinking," that has nothing to do with IGRA or the

[10]Importantly, however, the *Muhammad* court rejected the plaintiff's argument that the tribe's waiver of its immunity from suit in a "court of competent jurisdiction" meant that such suits could be heard in state court. It ruled that "the operative phrase cannot refer to state courts because they have no authority over conduct by a tribal entity unless such authority is expressly granted to them." 2010 WL 4365568, at p. 9.

Compact.

V. CONCLUSION

In *Wold II*, the Supreme Court described the state's attempt to require the tribe to accept state court jurisdiction over suits against the tribe or tribal entities arising in Indian country as "a severe intrusion on the Indians' ability to govern themselves according to their own laws." 476 U.S. at 889. So it is here. The Defendants in this case have shown no legitimate basis for the imposition of state court jurisdiction over suits against tribal gaming enterprises, and federal law commands that such cases may not be heard by state courts. For all of the foregoing reasons, and those set forth in Plaintiffs' Motion for Summary Judgment, Plaintiffs respectfully urge that the Court grant summary judgment on their claims against the Defendants.

Respectfully submitted,

ROTHSTEIN, DONATELLI, HUGHES,
DAHLSTROM, SCHOENBURG & BIENVENU, LLP

By: */s/Richard W. Hughes 8.1.2012*

Richard W. Hughes
rwhughes@rothsteinlaw.com
Donna M. Connolly
dconnolly@rothsteinlaw.com
P.O. Box 8180
1215 Paseo De Peralta
Santa Fe, NM 87504-8180
(505) 988-8004
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of August, 2012, I caused the foregoing pleading to be filed electronically through the CM/ECF system, which caused the following counsel to be served by electronic means, as fully reflected on the Notice of Electronic Filing:

David L. Plotsky plotlaw@verizon.net, plotskydougherty@aol.com
Charlotte Toulouse jtoul2403@aol.com
Arlyn G. Crow Acrow@opclawfirm.com
Michael B. Browde browde@law.unm.edu
Matthew Eric Jackson mjackson@nmag.gov

/s/Richard W. Hughes 8.1.2012
ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM, SCHOENBURG & BIENVENU, LLP